No. 82-1383.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1982.

WILLIAM J. CINTOLO,
PETITIONER,

*v.*

UNITED STATES OF AMERICA AND
THE HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Reply to United States' Brief in Opposition.**

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COURT FOR THE DISTRICT OF MASSACHUSETTS
Respondents

# REPLY TO POINTS ORIGINALLY RAISED IN BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Rule 22.5 of the Rules of this Court, Petitioner replies as follows to points first raised in the Government's Brief in Opposition.

1. The Government argues (Bf. 4-7) that the cases cited by Petitioner (Pet. 12) in which courts of appeals have held that disqualification of counsel does not result in an appealable order are distinguishable

in that in none save *In re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600, (D.C. Cir. 1976), did the attorney rather than the client appeal the disqualification order. Perhaps recognizing the "so what?" that such an argument might provoke, the Government proceeds to argue that since the clients could have discharged their counsel, who presumably would have no judicial recourse in the event of such a discharge, counsel should have no right of review when he is disqualified by the District Court. The argument is shockingly inept. It is tantamount to arguing that one whose house is destroyed by fire should have no recourse against an insurer who refuses to pay on the loss since, if he had had no insurance, he would have had to bear the loss himself anyway. That the decision of a client to discharge counsel may be unreviewable is no reason

for the decision of a court to be unreviewable.

There are yet three other defects in the Government's argument. The first is that the Court of Appeals plainly did not base its decision on the distinction suggested by the Government and, what is more, when the clients themselves *appealed*, and *sought extraordinary relief* with respect to, the orders disqualifying their counsel,[1/] the Court adhered to the position that the orders of disqualification were not appealable. Brief in Opposition, p. 1a. The second is that by appealing the order of disqualification and seeking extraordinary

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1/ The suggestion at p. 5 of the Brief in Opposition that the clients, Daw and Orlandella, only sought extraordinary relief, is untrue. The time for them to petition for review by certiorari has not expired, and it is entirely possible that they will yet seek review by certiorari.

relief in the Court of Appeals, the clients *have* manifested a desire to continue to be represented by Petitioner whether or not he is the "target" of an ongoing grand jury investigation. The third is that a conflict between a holding of the First Circuit and a holding of the District of Columbia Circuit is still a conflict between the circuits under Rule 17.1(a).

2. The Government suggests (Bf. 6-7) that in the case of *Flanagan v. U.S.*, 82-374, this court has before it a case dealing with the appealability of a pre-trial order disqualifying counsel in a criminal case and the present case is simply another case raising the same issue. In fact, however, *United States v. Flanagan*, 679 F.2d 1072, 1073, fn 1, (3rd Cir. 1982) plainly holds that such orders are appealable. There is no indication that the Government has

sought certiorari to review this holding. According to 51 L.W. 3496, the issues in *Flanagan* on certiorari are:

> (1) Is court of appeals' decision denying defendants counsel of their choice to present common defense, despite valid waiver of potential conflicts of interest, inconsistent with decisions of Supreme Court and every other circuit that has addressed issue?
>
> (2) Does Fed.R.Crim.P. 44(c) permit court to undercut defendants' constitutionally protected choice of retained counsel?
>
> (3) Does opinion of court below preclude presentation of common defense, regardless of number or affiliation of counsel?
>
> (4) Does opinion undermine ability of clients to consult with and retain counsel of their choice?
>
> (5) Will resolution of these issues diminish substantially workload of federal courts?

Since the Government concedes that there is a conflict among the circuits on the issue

of appealability of disqualification orders and can point to no case before this court in which the issue of appealability has been raised, there is good reason for certiorari to be granted.

3. The Government argues (Bf. 3-4) the merits of the case that the Court of Appeals declined to review, taking the position that witnesses may never be counselled by one who is the target of a grand jury (Bf. 3-4) and that even the Government's unsupported representation that one is a target is enough to warrant disqualification[2/] (Bf. 10). Apparently the Government takes the posi-

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2/ Apparently taking a page from Heller's *Catch-22*, the Government argues that if the representation that Petitioner is a target is made in bad faith, he would have a right to show the contrary, but since grand jury proceeding must remain secret, he should never have the opportunity to show that the representation was made in bad faith (Bf. 10).

tion that no amount of disclosure would cure the conflict. Petitioner will not repeat the arguments made at pp. 32-33 of the Petition. It is enough to point out for the present that if and when the Court of Appeals holds what the Government thinks it should hold, it will be time enough to determine whether its holding can be squared with the holding of the Second Circuit in *United States v. Curcio*, 694 F. 2d 14 (1982), and the holding of this Court in *Holloway v. Arkansas*, 435 U.S. 475, 482-483 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is a matter of curiosity why the Government should again argue the correctness of the judgment of the Court of Appeals on a point that the Court itself has sedulously refrained from deciding, see p. 3a of the Brief in Opposition, and why, if convinced that it

would prevail on the merits, it seeks so loudly and strongly to dissuade this Court from deciding whether the merits should have been reached.

## CONCLUSION

The petition for writ of certiorari should be granted.

By Petitioner's Attorney,

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